HJ. OMAR DIN MAWAIDIN

v.

MINISTER FOR HOME AFFAIRS, MALAYSIA & ANOR.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CRIMINAL APPLICATION NO. 44-56-90]
2 JUNE 1990

CRIMINAL PROCEDURE: *Habeas Corpus - Preventive detention - Statutory interpretation - Discretion of Minister - Restriction order - Detention order - Sections 3, 4, 4A, 7B of Emergency (Public Order and Prevention of Crime) Ordinance - Article 5 of Federal Constitution.*

On 17 November 1988 the Minister issued a restriction order against the applicant. On 31 March 1990 the Minister cancelled this restriction order and issued a detention order. The issue for determination was whether the Minister could revoke a restriction order and substitute for it a detention order without first complying with the requirements of s. 3(1) of the Ordinance.

Held:

[1] The Minister had incorrectly invoked his powers of cancellation under s. 4A(3) of the Ordinance, the more appropriate provision being s. 7B(1). A strict reading of s. 4A(3) leads to the conclusion that it is concerned only with the variation of or addition to or cancellation of any restrictions or conditions imposed and not with cancellation of a restriction order itself.

[2] (a) The substitution of a detention order for a restriction order meant that whereas previously the applicant's liberty had been merely curtailed it was now wholly taken away.

(b) Although the Minister has the power to do so, it is essential that he acts within the Ordinance. Section 3(1) is mandatory and not merely directory, so that the applicant was entitled to the safeguard of enquiries upon detention yet was denied that right, with the consequence that he had lost the chance that was fairly open to him in law of exculpating himself from the allegations made against him.

(c) Although the Court is convinced that the Minister acted in good faith, there had been a breach of the fundamental right guaranteed under Article 5(1) of the Constitution.

[Applicant to be set at liberty.]

Cases referred to:

Tan Hoon Seng v. Minister of Home Affairs [1990] 1 CLJ (Rep) 271
Rajoo a/l Ramasamy v. Minister of Home Affairs and Anor [1990] 1 CLJ (Rep) 256
Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri and Anor. Cr. Appeal no 9/90
Koh Yoke Koon v. Minister for Home Affairs & Anor. [1988] 1 MLJ 45
Bowditch v. Balchin [1850] 5 Ex 378; 155 ER 165
Barnard v. Gorman [1941] AC 378
Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129

Legislation referred to:

Emergency (Public Order and Prevention of Crime) Ordinance 1969, ss. 3(1), 4(1), 4A(1), (3), (1)(a), 7B(1), (2)

Federal Constitution, art. 5(1)

For the applicant - Karpal Singh (Danny C. Navarednam & Choo Hon Choy with him); M/s. Karpal Singh & Co.

For the respondents - Noorbahri bin Baharuddin DPP

JUDGMENT

Edgar Joseph Jr J:

Before I embark upon a consideration of this application for *habeas corpus*, there are certain preliminary observations I should like to make.

Judicial review of the actual exercise of the power to detain by the Minister of Home Affairs ("the Minister") in cases of preventive detention is very much a matter of statutory interpretation. It goes without saying, therefore, that in cases of preventive detention, the actual wording of the legislation conferring power upon the Minister is clearly of critical substance, so that if the width of the discretion is widely drawn, the tendency will be for the Court to leave the Minister with a broad range of choices within which to act, always provided that the detainee is still free to attempt to impugn the legality of his detention by raising questions as to whether the Minister has acted within the powers conferred in the particular case and whether the power to detain has been properly exercised.

There has been a consistent current of judicial opinion in our Courts, including the latest decisions of the Supreme Court, which indicate that when confronted with the problem of interpreting powers of preventive detention, they have interpreted them strictly so as to require that the provisions of the relevant statute are rigidly and meticulously complied with. (See for example, *Tan Hoon Seng v. Minister of Home Affairs* [1990] 1 CLJ (Rep) 271, *Rajoo a/l Ramasamy v. Inspector-General of Police & Ors* [1990] 1 CLJ (Rep) 256 and a series of 11 very recent appeals heard together, the first being *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri & Anor*. Supreme Court Cr. Appeal No. 9/90, in all of which the detainees succeeded on purely procedural or technical grounds).

I shall now proceed to consider the application before me.

For the sake of brevity and convenience, all references to sections in this judgment shall be to the Emergency (Public Order and Prevention of Crime) Ordinance 1969, ("the Ordinance") unless the context otherwise requires.

The Minister, who is the first respondent herein, purporting to act under s. 4A(3), had on 31 March 1990 made an order ("the cancellation order") cancelling a restriction order dated 17 November 1988 made under s. 4A(1), ("the restriction order") whereby the applicant, a self-styled practitioner in traditional medicine, had been restricted to Lumut, Daerah Manjong, Perak, for two years with effect from 19 November 1988. However, contemporaneously with the making of the cancellation order, the Minister had, purporting to act under s. 4(1), made a detention order, also dated 31 March 1990 ("the detention order") whereby the applicant was to be detained at the Pusat Pemulihan Akhlak, Pulau Jerejak, for a period of two years with effect from 31 March 1990.

The following provisions of the Ordinance are of central importance to this application and I must reproduce them:

Section 3(1)

Any police officer may without warrant arrest and detain pending enquiries any person in respect of whom he has reason to believe that there are grounds which would justify his detention under s. 4(1).

Section 4(1)

If the Minister is satisfied that with a view to preventing any person from acting in any manner prejudicial to public order it is necessary that that person should be detained, or that it is necessary for the suppression of violence or the prevention of crimes involving violence that that person should be detained, the Minister shall make an order (hereinafter referred to as a "detention order") directing that that person be detained for any period not exceeding two years.

Section 4A(1)

If the Minister is satisfied that for any of the purposes mentioned in s. 4(1) it is necessary that control and supervision should be exercised over any person or that restrictions and conditions should be imposed upon that person in respect of his activities, freedom of movement or places of residence and employment, but that for those purposes it is unnecessary to detain that person, he may make an order (hereinafter referred to as a "restriction order") imposing upon that person (hereinafter referred to as a "restricted person") all or any of the following restrictions and conditions:

(Then follows a list of ten possible restrictions and conditions.)

Section 4A(3)

The Minister may from time to time, by order in writing served on a restricted person, vary, add to or cancel any restrictions or conditions imposed upon him under subsection (1), and the restrictions or conditions as so varied and any additional restrictions or conditions so imposed shall, unless sooner cancelled, continue in force for the period specified by the Minister under subsection (1)(a).

Section 7B(1)

Notwithstanding anything contained in this Ordinance, the Minister may at any time revoke any detention order made under s. 4(1), or any restriction order made under s. 4A(1), or any suspended detention order, or any direction under s. 7A(1) or (2) for the extension of the duration of any such order, if he deems it just or fit to do so.

Section 7B(2)

Any revocation under subsection (1) shall be without prejudice to the validity of the order or to anything done thereunder, or to the power of the Minister to make a fresh order or give a fresh direction under the provisions mentioned in subsection (1) in respect of the person against whom the order or direction which is revoked was made or given.

The affidavit evidence filed on behalf of the Minister disclosed that the cancellation order had been served upon the applicant at 4 p.m. on 31 March 1990 at the Contingent Police Headquarters, Ipoh, and that ten minutes later, he had been placed under custody in order to be served with the detention order. Some fifteen minutes after that, the grounds of his arrest had been explained to him and then the detention order served upon him. One hour and fifteen minutes later, he left under escort for the Pusat Pemulihan Akhlak, Pulau Jerejak, Penang, arriving there on 2 April 1990 when he was handed over to the proper officer.

Before me, Counsel for the applicant has challenged both the validity of the detention order and the applicant's detention thereunder on a number of grounds.

I do not, however, consider it necessary, having regard to the conclusions at which I have arrived regarding one of these grounds to deal with the other grounds argued by Counsel.

It was contended that where a restriction order is made under s. 4A(1) it shall remain in force for a period not exceeding two years (s. 4A(1)(a)) but if, during the period it remains in force, the Minister is desirous of varying, adding to or cancelling any of the ten sorts of restrictions or conditions imposed upon a restricted person he may do so by order in writing made pursuant to the powers conferred upon him by s. 4A(3). But, when as here, the Minister is desirous, not of merely varying, adding to or cancelling any restrictions or conditions imposed, but of revoking the restriction order he must have recourse to his powers under s. 7B(1).

At this stage, it would be sufficient to say that Counsel's submission, in summary, was that the Minister had incorrectly invoked his powers of cancellation under s. 4A(3); the more appropriate provision being s. 7B(1).

With this submission I agree. A strict reading of s. 4A(3) leads to the conclusion that it is concerned only with the variation of or addition to or cancellation of any restrictions or conditions imposed and not with cancellation of a restriction order itself; though if all the restrictions or conditions are cancelled this would render the restriction order toothless but, with this qualification; namely, that the Minister could, at a later date, reimpose any of the restrictions or conditions previously cancelled or indeed impose fresh restrictions or conditions.

However, I shall assume in favour of the Minister, though without deciding the point, that this flaw in the process leading to the applicant's detention is not so serious as to preclude the Court from condoning it under the *de minimis* rule. Similarly, I shall also assume in favour of the Minister, again without deciding the point, that a "fresh order" within the meaning of s. 7B(2) means any of the orders categorised under s. 7B(1), so that the Minister has the power, **provided he complies with the necessary conditions precedent**, to substitute as he did in the present case, a detention order for a restriction order.

I now come to the heart of the present application: can the Minister revoke a restriction order and substitute for it a detention order without first complying with the requirements of s. 3(1)?

Briefly, s. 3(1) requires that a suspected person in respect of whom a police officer has reason to believe there are grounds which would justify detention under s. 4(1), shall first be detained pending enquiries for a period not exceeding 60 days. It was said that this would necessitate police investigations, including the interviewing of witnesses and, more importantly, of the arrested person who would thus be afforded the opportunity of being heard and so perhaps, exculpating himself, yet the affidavit evidence filed on behalf of the Minister showed that these requirements were never observed. It was pointed out that upon cancellation of the restriction order, the applicant was ten minutes thereafter placed under custody, **not** for purposes of the enquiries envisaged under s. 3(1), but purely for purposes of being served with the detention order which was in fact done five minutes subsequently.

It is obvious that the substitution of a detention order for a restriction order meant that whereas previously the applicant's liberty had been merely curtailed it was now wholly taken away. That power resides in the Minister to do so I have no doubt, but to exercise it, it is essential that he acts within the four corners of the Ordinance.

In my view, the requirements of s. 3(1) are mandatory and not merely directory, so that the applicant was entitled to the safeguard of enquiries upon detention, yet he was denied that right, with the consequence that he had lost the chance that was fairly open to him in law of exculpating himself from the allegations made against him.

As I said in *Koh Yoke Koon v. Minister for Home Affairs & Anor* [1988] 1 MLJ 45 ".... in a matter concerning the liberty of the subject - always a priceless asset - the Court should walk very warily, preferring to interpret words and phrases in their ordinary and natural meaning than to embark on inferences or speculations about such a power. I am fortified in this by the following dictum of Pollock C.B. in *Bowditch v. Balchin* [1850] 5 Ex 378; 155 ER 165 cited with approval by Lord Wright in *Barnard v. Gorman* [1941] AC 378, 393: 'In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute'."

The result, therefore, is that although I am completely convinced, having regard to the contents of his affidavit (Encl.8), that the Minister had acted as he did, in good faith, in the interest of public order **and** although it is not open to me to consider either the question whether there was reasonable cause to make the detention order or the protestations of innocence of the applicant (see *Karam Singh v. Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 - now given statutory force), I am satisfied that there had been here a breach of the fundamental right guaranteed under Article 5(1) of the Federal Constitution and so I have no discretion, but to grant this application. It follows that the applicant must be set at liberty forthwith and I so order.

Also found at [1990] 2 CLJ 219